

1 Richard T. Drury (SBN 163559)
richard@lozeaudrury.com
2 Rebecca Davis (SBN 271662)
rebecca@lozeaudrury.com
3 **LOZEAU DRURY LLP**
4 410 12th Street, Suite 250
Oakland, CA 94607
Telephone: (510) 836-4200
5 Facsimile: (510) 836-4205

6 [Additional counsel appearing on signature page]

7 *Attorneys for Plaintiffs*
8 ERIC MENDEZ and the proposed class

9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11
12 ERIC MENDEZ, individually and on
13 behalf of a class of similarly situated
individuals,

14 Plaintiff,

15 v.

16 PRICE SELF STORAGE
17 MANAGEMENT, INC.,

18 Defendant.
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Case No. 3:15-cv-02077-AJB-JLB

**MOTION FOR AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
AWARD OF ATTORNEYS' FEES,
EXPENSES, AND INCENTIVE
AWARD**

Date: August 22, 2016
Time: 3:00 p.m.

The Honorable Anthony J. Battaglia

TABLE OF CONTENTS

| | |
|---|------------|
| TABLE OF AUTHORITIES | iii |
| I. INTRODUCTION | 1 |
| II. FACTUAL BACKGROUND AND TERMS OF SETTLEMENT | 2 |
| A. The TCPA and its Implementing Regulations | 2 |
| B. Summary of the Litigation, Mediation and Settlement..... | 4 |
| C. Terms of the Settlement Agreement and Provision for Reasonable Attorneys' Fees and Incentive Awards | 6 |
| III. ARGUMENT..... | 8 |
| A. Class Counsel's Requested Fee Award is Demonstrably Reasonable—It Represents 22% of the Settlement Fund, Which is Less Than the 25% Benchmark for Attorneys' Fees in the Ninth Circuit..... | 9 |
| 1. Class Counsel Achieved an Exceptional Result for Class Members | 10 |
| 2. Class Counsel Faced Meaningful Risk in Taking the Case | 13 |
| 3. The Benefits Extend Beyond the Settlement Fund..... | 14 |
| 4. An Award of 22.22% Falls Within the Market Rate | 14 |
| 5. Class Counsel Faced Costs and Were Unable to Take Other Cases While Prosecuting this Matter..... | 15 |
| 6. Class Counsel Prosecuted this Case on a Contingent Basis | 16 |
| B. The Requested Fee is Also Reasonable Under the Lodestar Method | 17 |
| C. Class Counsel Also Incurred \$3,109.59 in Expenses | 20 |
| D. The Court Should Approve the Requested Incentive Award..... | 20 |
| IV. CONCLUSION | 21 |

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

| | |
|--|----|
| <i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980) | 8 |
| <i>Hall v. Cole</i> , 412 U.S. 1 (1973) | 14 |
| <i>Mims v. Arrow Fin. Servs. LLC</i> , 132 S. Ct. 740 (2012) | 2 |

UNITED STATES CIRCUIT COURT OF APPEALS CASES

| | |
|---|----------|
| <i>Fischel v. Equitable Life Assur. Soc'y of U.S.</i> , 307 F.3d 997 (9th Cir. 2002) | 18 |
| <i>Florida v. Dunne</i> , 915 F.2d 542 (9th Cir. 1990) | 8 |
| <i>Gager v. Dell Fin. Servs., LLC</i> , 727 F.3d 265 (3d Cir. 2013) | 3 |
| <i>Grant v. Capital Mgmt. Srvs., L.P.</i> , 499 F. App'x 598 (9th Cir. 2011) | 3 |
| <i>In re Bluetooth Headset Prods. Liab. Litig.</i> , 654 F.3d 935 (9th Cir. 2011) | 8, 9, 10 |
| <i>In re Online DVD Rental Antitrust Litig.</i> , 2015 WL 846008 (9th Cir. 2015) | 8, 9 |
| <i>In re Online DVD Rental Antitrust Litig.</i> , 779 F.3d 934 (9th Cir. 2015) | 10 |
| <i>In re Pacific Enterprises Sec. Litig.</i> , 47 F.3d 373 (9th Cir. 1995) | 14 |
| <i>In re Wash. Pub. Power Supply Systems Sec. Litig.</i> , 19 F.3d 1291 (9th Cir. 1994) | 16 |
| <i>Landsman & Funk, P.C. v. Skinder-Strauss Associates</i> , 2016 WL 611441 (3d Cir. 2016) | 15 |
| <i>Morris v. Lifescan, Inc.</i> , 54 F. App'x 663 (9th Cir. 2003) | 14 |
| <i>Rodriguez v. West Publ'g Corp.</i> , 563 F.3d 948 (9th Cir. 2009) | 20 |
| <i>Satterfield v. Simon & Schuster, Inc.</i> , 569 F.3d 946 (9th Cir. 2009) | 2 |
| <i>Staton v. Boeing Co.</i> , 327 F.3d 938 (9th Cir. 2003) | 17 |
| <i>Vizcaino v. Microsoft Corp.</i> , 290 F.3d 1043 (9th Cir. 2002) | 14, 18 |
| <i>Williams v. MGM-Pathe Communications Co.</i> , 129 F.3d 1026 (9th Cir. 1997) | 10 |

UNITED STATES DISTRICT COURT CASES

| | |
|--|-----------|
| <i>Aboudi v. T-Mobile USA, Inc.</i> , 2015 WL 266137 (S.D. Cal. 2015) | 9, 10, 14 |
| <i>Bellinghausen v. Tractor Supply Co.</i> , 2015 WL 1289342 (N.D. Cal. 2015) | 20 |
| <i>Bridgeview Health Care Ctr., Ltd. v. Jerryclark</i> , 2015 WL 4498741 (N.D. Ill. 2015) | 15 |
| <i>Cohorst v. BRE Props., Inc.</i> , 2011 WL 7061923 (S.D. Cal. 2011) | 12 |

| | | |
|----|--|---------------|
| 1 | <i>Fontes v. Heritage Operating, L.P.</i> , 2016 WL 1465158 (S.D. Cal. 2016) | 18 |
| 2 | <i>Gragg v. Orange Cab Co., Inc.</i> , C-12-0576, 2013 WL 1788479, at *1 (W.D. Wash. Apr. 26, 2013) | 3 |
| 3 | <i>Hageman v. AT&T Mobility LLC</i> , 2015 WL 9855925 (D. Mont. 2015) | 15 |
| 4 | <i>Hartless v. Clorox Co.</i> , 273 F.R.D. 630 (S.D. Cal. 2011)..... | 20 |
| 5 | <i>Hopson v. Hanesbrands Inc.</i> , 2009 WL 928133 (N.D. Cal. 2009) | 20 |
| 6 | <i>In re Activision Sec. Litig.</i> , 723 F. Supp. 1373 (N.D. Cal. 1989)..... | 8, 14 |
| 7 | <i>In re Capital One Tel. Consumer Prot. Act Litig.</i> , 80 F. Supp. 3d 781 (N.D. Ill. 2015) | 12 |
| 8 | <i>In re Heritage Bond Litig.</i> , 2005 WL 1594389 (C.D. Cal. 2005) | 12 |
| 9 | <i>In re Immune Response Sec. Litig.</i> , 497 F. Supp. 2d 1166 (S.D. Cal. 2007) | 17 |
| 10 | <i>In re Omnivision Techs., Inc.</i> , 559 F. Supp. 2d 1036 (N.D. Cal. 2008) | 12, 16 |
| 11 | <i>In re Oracle Sec. Litig.</i> , 131 F.R.D. 688 (N.D. Cal. 1990) | 8 |
| 12 | <i>In re Nuvelo, Inc. Sec. Litig.</i> , 2011 WL 2650592 (N.D. Cal. 2011)..... | 14 |
| 13 | <i>Kolinek v. Walgreen Co.</i> , 311 F.R.D. 483 (N.D. Ill. 2015)..... | 15 |
| 14 | <i>Lees v. Anthem Ins. Companies Inc.</i> , 2015 WL 3645208 (E.D. Mo. 2015)..... | 15 |
| 15 | <i>Martin et al v. Merrill Lynch, Pierce, Fenner & Smith, Inc. et al</i> , 10-cv-04020-CW (N.D. Cal. 2011)..... | 14 |
| 16 | <i>Rose v. Bank of Am. Corp.</i> , 2014 WL 4273358 (N.D. Cal. 2014) | 12 |
| 17 | <i>Saf-T-Gard Int'l, Inc. v. Seiko Corp. of Am.</i> , No. 09 C 0776 (N.D. Ill. 2011) | 15 |
| 18 | <i>Satterfield v. Simon & Schuster, Inc.</i> , 06-cv-02893-CW (N.D. Cal. 2010) | 14 |
| 19 | <i>Spine & Sports Chiropractic, Inc. v. Zirmed, Inc.</i> , 2015 WL 9413143 (W.D. Ky. 2015)..... | 15 |
| 20 | <i>Thieriot v. Celtic Ins. Co.</i> , 2011 WL 1522385 (N.D. Cal. 2011)..... | 17 |
| 21 | <i>Vandervort v. Balboa Capital Corp.</i> , 8 F. Supp. 3d 1200 (C.D. Cal. 2014)..... | 15 |
| 22 | <i>Young v. Polo Retail, LLC</i> , 2007 WL 951821 (N.D. Cal. 2007)..... | 17 |
| 23 | STATUTES, RULES AND REGULATIONS | |
| 24 | 47 U.S.C. § 227..... | <i>passim</i> |
| 25 | OTHER SOURCES | |
| 26 | Herbert B. Newberg & Alba Conte, <i>Newberg on Class Actions</i> (3rd ed. 1992) | 18 |

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| 1 | MANUAL FOR COMPLEX LITIGATION (4th ed. 2004) | 8 |
| 2 | Rules and Regulations Implementing the Telephone Consumer Protection | |
| 3 | Act of 1991, 73 FED. REG. 6041-01, 6042 (FEB. 1, 2008) | 3 |

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1 **I. INTRODUCTION**

2 The class action Settlement Agreement reached in this Telephone Consumer
3 Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”) case is an outstanding result that
4 provides substantial payments to Settlement Class Members who file timely and
5 valid claims. Indeed, under the terms of the Settlement, Defendant Price Self
6 Storage Management, Inc. (“Defendant” or “PSS”) has created a Settlement Fund in
7 the amount of \$450,000, from which Settlement Class Members may make claims
8 for either \$750 cash payments or \$1,100 in certificates that can be used to pay down
9 any outstanding balance on the Settlement Class Members’ account with PSS or to
10 secure future storage services with PSS. PSS will also be required to fix its text
11 messaging system so as to properly honor and process opt-out requests. This
12 Settlement Agreement thus presents a significant benefit to the Settlement Class
13 Members and exceeds the typical amount awarded in TCPA class actions.

14 Such impressive results are the direct result of meaningful time, effort, and
15 energy devoted to the litigation by Settlement Class Counsel and Class
16 Representative Eric Mendez (“Plaintiff” or “Mendez”). Indeed, the Settlement
17 Agreement and its favorable terms were made possible by Class Counsel’s work
18 investigating and prosecuting the case, and negotiating the terms through a formal,
19 full-day mediation.

20 In recognition and compensation for this work, the Settlement Agreement
21 calls for an attorneys’ fee award to Class Counsel in the amount of \$100,000 and an
22 incentive award of \$3,000 to Mendez for dutifully acting as the Class
23 Representative. Such a fee is reasonable and falls below the benchmark for
24 attorneys’ fee awards in the Ninth Circuit when a common fund is created. Further,
25 the fee is reasonable under the lodestar method based on the amount of effort and
26 time expended by Class Counsel to bring, prosecute, and settle this action. Indeed, a
27 lodestar crosscheck, a multiplier of only 1.03 is required to substantiate the fee
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1 amount, which is within the range typically seen in similar settlements in the Ninth
2 Circuit.

3 The Court should approve the incentive award for Mendez as well. Plaintiff is
4 seeking an incentive award in the amount of \$3,000, which is reasonable in terms of
5 his role in bringing this suit, as without his participation as the named Plaintiff this
6 Settlement would not have been reached in the first place.

7 For these reasons and as discussed further below, Plaintiff respectfully
8 requests the Court enter an Order granting the instant Motion and approving the
9 negotiated attorneys' fees and incentive award.

10 **II. FACTUAL BACKGROUND AND TERMS OF THE SETTLEMENT**

11 Prior to analyzing Class Counsel's fee request it is helpful to review the
12 TCPA provisions at issue, the history of Mendez's experience with Price Self
13 Storage text messages, and the litigation and settlement process that lead to the
14 instant Settlement Agreement.

15 **A. The TCPA and its implementing Regulations.**

16 A brief summary of the law that forms the basis of Plaintiff's claims helps put
17 the request for attorneys' fees in proper context. Congress enacted the TCPA in
18 1991 as a response to "[v]oluminous consumer complaints about abuses of
19 telephone technology...." *Mims v. Arrow Financial Svcs's, LLC*, 132 S. Ct. 740, 744
20 (2012). In enacting the TCPA, Congress sought to "protect the privacy interests of
21 telephone subscribers." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th
22 Cir. 2009); *see also Mims*, 132 S. Ct. at 745. Courts have uniformly held that the
23 TCPA applies with equal force to the making of text message calls as it does to the
24 making of voice calls to cellular phones. *Satterfield*, 569 F.3d at 954.

25 To prevail, a plaintiff must show that a person: (1) made text message calls,
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(2) using an Automatic Telephone Dialing System (ATDS)¹, (3) to a telephone number assigned to a cellular telephone service. *See* 47 U.S.C. § 227(b)(1)(A)(iii). Whether Plaintiff and others provided their prior express consent to receive such text messages is an affirmative defense. *See e.g., Grant v. Capital Mgmt. Srvs., L.P.*, No. 11-56200, 2011 WL 3874877, at *1 n.1 (9th Cir. Sept. 2, 2011) (“‘[E]xpress consent’ is not an element of a TCPA plaintiff’s prima facie case, but rather is an affirmative defense for which the defendant bears the burden of proof.”).

Perhaps most relevant to this case is that under the TCPA consumers must have the ability to revoke consent once it has been provided. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; American Association of Healthcare Administrative Management, Petition for Expedited Declaratory Ruling and Exemption; et al*, CG Docket No. 20–278 (July 15, 2015) (“Omnibus TCPA Ruling” ¶ 47) (“[W]e clarify that a called party may revoke consent at any time and through any reasonable means”); *In re Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991, Declaratory Ruling as to Petition of SoundBite Communications, Inc.*, CG Docket No. 20–278 (Nov. 29, 2012) (“SoundBite Ruling”); *see also Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 272 (3d Cir. 2013) (“In sum, we find that the TCPA provides consumers with the right to revoke their prior express consent to be contacted on cellular phones by autodialing systems.”). Applied here, Mendez alleges that PSS’s text messaging platform continued to send him (and others) text messages even after they had replied “STOP” so as to revoke their consent.

¹ An ATDS means “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1). The FCC, in turn, has explained that equipment that dials or sends texts to a list of numbers is an ATDS, because “‘the basic function of such dialing equipment’ is the same—‘the capacity to dial numbers without human intervention.’” *Gragg v. Orange Cab Co., Inc.*, C-12-0576, 2013 WL 1788479, at *2 (W.D. Wash. Apr. 26, 2013) (*citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 73 Fed.Reg. 6041, 6042 (Feb. 1, 2008)).

1 The TCPA sets statutory damages in the amount of \$500 per violation
 2 (trebled to \$1,500 per text message if the violations are found to have been willful)
 3 and provides for injunctive relief prohibiting the further transmission of such
 4 messages. *See* 47 U.S.C. § 227(b)(3)(A-B).

5 Having put Plaintiff's claims in legal perspective, a review of the Plaintiff's
 6 claims and the process leading up to the Settlement is demonstrative of the fairness
 7 of the Agreement.

8 **B. Summary of the Litigation, Mediation and Settlement.**

9 In or around January 2013, Plaintiff Mendez entered into an agreement for a
 10 storage unit with PSS, and he provided his cellular telephone number to the
 11 company in connection with his application. (Compl. at 5.) Shortly thereafter,
 12 Defendant began sending messages to Plaintiff's cellular phone number. (*Id.*) A
 13 typical text message would read:

14 Eric, Please contact Price Self Storage about your storage acct. To
 15 discuss call 19092530098 or Pat at <http://cptl.me/3gf909> TXT STOP to
 Unsubscribe.

16 (*Id.*) Plaintiff received the same or similar text messages for approximately six
 17 months, when he decided that he no longer wished to receive them. (*Id.*) Following
 18 the instructions contained in the message, Plaintiff typed and sent "STOP" to
 19 unsubscribe from the texts. (*Id.*) Instead of honoring Plaintiff's request, however,
 20 PSS, through its text messaging vendor, continued to send Plaintiff text messages.
 21 When Mendez responded STOP, some of these messages stated that PSS could not
 22 receive messages and to call the number listed to stop receiving messages. (*Id.*)
 23 Mendez then called the number contained in the messages and an operator informed
 24 him that in order to stop the text messages he would need to physically appear at a
 25 PSS location. (*Id.* at 5-6.) After informing the operator that he would be unable to
 26 physically travel to PSS's location, the operator told Plaintiff that he could stop the
 27 text messages by replying "STOP." (*Id.* at 6.) Like before, Plaintiff's "STOP"
 28 response did not prevent the text messages from being sent to his cellphone.

1 In or around June or July of 2014, Plaintiff visited a PSS location to request
2 his opt-out in person. (*Id.*) There, a PSS employee informed Plaintiff that he would
3 be removed from the text message list. Despite this assurance, just a few weeks later
4 Plaintiff again started receiving text messages from PSS's system. (*Id.*) Plaintiff
5 replied "STOP" to no avail for over a year. Mendez went back to PSS to make
6 another in-person request that his number be removed from PSS's list. (*Id.*)

7 Given his inability to make PSS stop texting him, Plaintiff filed his Class
8 Action Complaint in the United States District Court for the Southern District of
9 California on September 17, 2015 alleging PSS violated the TCPA by, through the
10 use of an automatic telephone dialing system ("ATDS"), sending text messages to
11 Plaintiff without Plaintiff's prior express consent and continued to send text
12 messages after Plaintiff had replied "STOP", thereby revoking any previous
13 supposed consent. (*See* Dkt. 1.)

14 Shortly following the effectuation of service, PSS's attorneys appeared in the
15 case and reached out to have an early discussion regarding their respective views of
16 the lawsuit's merits and pitfalls. This allowed Class Counsel to engage in a frank
17 and transparent discussion about the case and enabled the Parties to set forth their
18 respective views of the claims.

19 Counsel decided during these early discussions that private mediation. As part
20 of this process, the Parties agreed to engage in informal discovery (under a
21 protective order to safeguard confidentiality) regarding the size of the alleged class
22 and the number of text messages at issue. The information disclosed during this
23 process allowed Plaintiff to determine the size of the potential Class and to evaluate
24 the probability of success and the value of the claims in question. (Declaration of
25 Steven L. Woodrow, "Woodrow Decl.," attached hereto as Exhibit A, ¶ 9.)

26 The Parties agreed to mediate the case in Denver, Colorado. As such, the
27 mediation was conducted on January 5, 2016 in Denver, Colorado and was overseen
28 by the Honorable Matthew Railey (Ret.) of the Judicial Arbitration Group, Inc.

1 (“JAG”). (*Id.* ¶ 10.) Following extensive discussions facilitated by Judge Railey, the
 2 Parties reached a Settlement Agreement. (*Id.* ¶ 11.) Only after the Settlement was
 3 agreed upon in principle with respect to the relief to be made available to the
 4 Settlement Class Members—here, substantial cash payments or certificates for
 5 future storage—did the parties negotiate for reasonable attorneys’ fees for Class
 6 Counsel and an appropriate incentive award for Plaintiff Mendez. (*Id.* ¶ 13.)

7 Plaintiff moved for preliminary approval on March 7, 2016. (Dkt. 29.)
 8 Defendant filed its Non Opposition to the Motion for Preliminary Approval on May
 9 9, 2016. (Dkt. 35.) The Court held a hearing on the Motion on May 12, 2016 (Dkt.
 10 36) and granted Preliminary Approval on May 13, 2016. (Dkt. 37.)

11 **C. Terms of the Settlement Agreement and Provision for Reasonable**
 12 **Attorneys’ Fees and Incentive Awards.**

13 The “Settlement Class” is defined as: all Persons in the United States or its
 14 territories who at any point from the beginning of time up through the date of this
 15 agreement: (a) received at least one text message on his or her cellular telephone
 16 from PSS; (b) responded to the text message with the response STOP; and (c)
 17 received at least one additional text message from PSS apart from any message
 18 confirming the Person’s STOP request. (Settlement Agreement, Art. 1, ¶ 1.7.)

19 Class Counsel, through their efforts in the case in terms of pre-suit
 20 investigation, briefings, the exchange of informal discovery, conferences with
 21 opposing counsel, and the mediation process, were able to construct and negotiate a
 22 settlement that provides substantial monetary relief to Settlement Class members
 23 who file claims.

24 Under the terms of the Settlement, PSS has established a Settlement Fund
 25 consisting of \$450,000 from which Class Members may make claims to receive
 26 individual cash payments of \$750 or certificates for \$1,100 to use in paying current
 27 or future storage fees with PSS. All payments made pursuant to the Settlement will
 28 come from the Settlement Fund, including: (1) the payment of all claims (submitted

1 and paid in accordance with the provisions below), (2) all administrative, notice, and
2 claims expenses (the “Settlement Administration Costs”), (3) the incentive awards
3 to the Class Representatives (“Incentive Award”), and (4) any award of reasonable
4 attorneys’ fees and reimbursement of expenses (“Attorneys’ Fees and Costs”) as
5 approved by the Court. (Woodrow Decl. ¶ 21.)

6 In addition to the monetary relief to the Class Members, PSS has also agreed
7 to take action to prevent such unlawful actions to continue in the future. As such, it
8 has agreed to use commercially-reasonable efforts to honor requests from customers
9 to stop or opt-out of receiving text messages from the company for a period of six
10 (6) months from the Effective Date. In reality, PSS has essentially already addressed
11 this issue and has stopped such text messages in response to this litigation.

12 On May 13, 2016 the Court held a hearing on Plaintiff’s Motion for
13 Preliminary Approval of Class Action Settlement and granted preliminary approval
14 to the Settlement Agreement. (Dkt. 37.) Following the granting of preliminary
15 approval, the Settlement Administrator caused Notice to be sent to the last known
16 mailing address of 312 Class Members. (Woodrow Decl. ¶ 16.) Each Class Member
17 was sent, via first-class mail, the approved Notice Form and Claim Form. (*Id.*)
18 Somewhat surprisingly, the initial response from the Class Members has been quiet,
19 with only a handful of claims having been filed. (*Id.* ¶ 17.) Because of this, Class
20 Counsel has obtained the Class List and is in the process of calling the Settlement
21 Class Members so as to encourage and assist them with filing claims. (*Id.* ¶ 18.)

22 The Settlement Agreement also provides that PSS will not oppose an
23 application submitted by Plaintiff for an incentive award to Mendez, as
24 representative of the Settlement Class, subject to Court approval, of three thousand
25 dollars (\$3,000). (Settlement Agreement Art. 8, ¶ 8.3.) The Settlement Agreement
26 further states that PSS will not oppose an application submitted by proposed Class
27 Counsel for an award of one hundred thousand dollars (\$100,000 USD) in
28 Attorneys’ Fees and Expenses. (*Id.*, ¶ 8.1.)

As explained below, given the substantial relief obtained for the benefit of the Settlement Class, the Court should approve the requested attorneys' fees of \$100,000, which represents 22.22% of the Settlement Fund established under the Settlement Agreement attained in this case.

III. ARGUMENT

The Supreme Court has "consistently recognized that a litigant or lawyer who recovers a fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). When a settlement creates a common fund that benefits the entire Class, the Court may use either the lodestar method or the percentage-of-recovery method when determining reasonable attorneys' fees. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("[b]ecause the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar...")); *In re Online DVD Rental Antitrust Litig.*, 2015 WL 846008, at *9 (9th Cir. Feb. 27, 2015).

While district "courts [ultimately] have discretion to employ either the lodestar method or the percentage-of-recovery method[,] when a settlement produces a common fund for the class, courts in the Ninth Circuit most often employ a percentage-of-recovery method and awards class counsel a fee that constitutes a reasonable percentage of the fund. *See In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378-79 (N.D. Cal. 1989) (holding that the percentage-of-recovery method is preferable to the lodestar method because it encourages efficient resolution by providing an incentive for early, yet reasonable settlement); *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 689 (N.D. Cal. 1990); *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (citing a "groundswell of support for mandating a percentage-of-the-fund approach in common fund cases"); *see also Manual for*

1 *Complex Litigation* 4th Ed. 14.121 (2004) (“in practice, the lodestar method is
2 difficult to apply, time consumer to administer, inconsistent in result . . . capable of
3 manipulation . . . and creates inherent incentive to prolong the litigation”).

4 Though a percentage-of-the-fund method is preferred, the Ninth Circuit has
5 also determined the “application of the ‘lodestar method’ may provide a useful
6 ‘cross-check’ as to the reasonableness of a given percentage award”. *Aboudi v. T-*
7 *Mobile USA, Inc.*, No. 12cv2169 BTM, 2015 WL 266137, at *7 (S.D. Cal. Aug. 18,
8 2015) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002)).
9 The lodestar method requires “multiplying the number of hours [Class Counsel] . . .
10 reasonably expended on the litigation . . . by a reasonable hourly rate for the region
11 and for the experience of the lawyer.” *In re Online DVD Rental Antitrust Litig.*,
12 2015 WL 846008, at *9. Indeed, “to restrict Class Counsel to the hourly rates they
13 customarily charge for non-contingent work – where payment is assured – would
14 deprive them of any financial incentive to accept contingent-fee cases which may
15 produce nothing. (*Id.*) Courts have decided that, “multipliers of 1 to 4 are . . .
16 appropriate in common fund cases.” *Aboudi*, 2015 WL 266137 at *7.

17 As explained below, the requested attorneys fees in this case are supported
18 when evaluated both as a percentage of the Settlement Fund achieved in this case as
19 well as when viewed in light of Class Counsel’s lodestar. As such, the Court should
20 have little difficulty awarding the requested and agreed-upon attorneys’ fees.

21 **A. Class Counsel’s Requested Fee Award is Demonstrably**
22 **Reasonable—It Represents 22% of the Settlement Fund, Which is**
23 **Less Than the 25% Benchmark for Attorneys’ Fees in the Ninth**
24 **Circuit.**

25 Generally speaking, “the benefit to the Class is easily quantified in common-
26 fund settlements . . . [and Courts may] . . . award attorneys a percentage of the
27 common fund in lieu of the often more time-consuming task of calculating lodestar.”
28 *In re Bluetooth*, 654 F.3d at 942. The Ninth Circuit has determined that 25% of the
Settlement Fund is an appropriate benchmark for award of attorneys’ fees,

1 depending on the quality of the representation by counsel, the risks of continued
 2 litigation, and the results achieved for the class. *Id.*, 654 F.3d. at 942 (citing *Six*
 3 *Mexican Workers*, 904 F.2d at 1311), which should be adjusted upward or
 4 downward only in “unusual circumstances.” *Grauly*, 886 F.2d at 272²; *see also*
 5 *Aboudi*, 2015 WL 266137 at *7. Plaintiff’s requested attorneys’ fees of \$100,000
 6 from the \$450,000 Settlement Fund is 22% and falls below this benchmark. This
 7 alone signals the reasonableness of the attorneys’ fees.

8 Further, courts consider a non-exhaustive list of factors when assessing a
 9 request for attorneys’ fees using the percentage method. These factors include: “the
 10 extent to which class counsel achieved exceptional results for the class, whether the
 11 case was risky for class counsel, whether counsel’s performance generated benefits
 12 beyond the cash settlement fund, the market rate for the particular field of law, . . .
 13 the burdens class counsel experienced while litigating the case (*e.g.*, cost, duration,
 14 foregoing other work), and whether the case was handled on a contingency basis.”
 15 *In re Online DVD Rental Antitrust Litig.*, 779 F.3d 934, 954 (9th Cir. 2015) (*citing*
 16 *Vizcaino*, 290 F.3d at 1047–50).

17 As explained below, each of these factors supports the requested fee award.

18 **1. Class Counsel Achieved an Exceptional Result for Class** 19 **Members.**

20 The first factor examines the benefits obtained for the Settlement Class
 21 Members. Given the substantial monetary relief negotiated here—in addition to the
 22 prospective relief—this factor heavily weights in favor the fee award requested.

23 Class Counsel has secured a common fund of \$450,000 for the benefit of the
 24 Class, which provides Class Members with the option to choose between two
 25 alternatives: \$750 in cash or a \$1,100 PSS certificate to use towards outstanding or
 26

27 ² The percentage benchmark should be measured against the full fund established by
 28 the settlement and not the actual payout to the class. *Williams v. MGM-Pathe*
Communications Co., 129 F.3d 1026, 1027 (9th Cir. 1997).

future storage fees. (Settlement Agreement, Art. 2, ¶ 2.1.) This is an outstanding result which far exceeds the amount per claim typically available in TCPA settlements.

| CASE NAME | AMOUNT PER CLAIMANT |
|--|------------------------------|
| <i>Rose v. Bank of Am. Corp.</i> , 2014 WL 4273358 (N.D. Cal. Aug. 29, 2014) | \$20.00 to \$40.00 |
| <i>In re Jiffy Lube Int'l, Inc. Text Spam Litig.</i> , 11-md-2261 (S.D. Cal.) | \$12.97; or, \$17.29 voucher |
| <i>Kazemi v. Payless Shoesource, Inc.</i> , 09-cv-5142 (N.D. Cal.) | \$25.00 voucher |
| <i>In re Capital One Telephone Consumer Protection Act Litigation</i> , 12 C 10064 MDL No. 2416 (N.D. Ill. 2015) | \$34.60 |
| <i>Steinfeld v. Discover Financial Services</i> , 12-cv-1118 JSW (N.D. Cal.) | \$48.69 |
| <i>Bellows v. NCO Fin. Sys.</i> , 2008 U.S. Dist. LEXIS 13525 (S.D. Cal. 2008) | \$70.00 |
| <i>Malta v. Fed. Home Loan Mortg. Corp.</i> , 10-cv-1290 BEN (S.D. Cal.) | \$84.82 |
| <i>Wilkins, et al. v. HSBC Bank Nevada, N.A.</i> , 14 C 190 (N.D. Ill.) | \$102.62 |
| <i>Gutierrez v. Barclays Grp.</i> , 10-cv-1012 (S.D. Cal.) | \$100.00 |
| <i>Robles v. Lucky Brand Dungarees, Inc.</i> , 10-cv-4846-MMC (N.D. Cal.) | \$100.00 |
| <i>Kramer v. B2Mobile</i> , 10-cv-2722 CW (N.D. Cal.) | \$100.00 |
| <i>Lanza v. Upscale Events by Mosaic, LLC</i> , 13-cv-80093 DMM (S.D. Fla.) | \$150.00 |
| <i>Ellison v. Steven Madden, Ltd.</i> , 11-cv-5935 (C.D. Cal.) | \$150.00 |

| | |
|--|----------|
| | |
| <i>Bayat v. Bank of the West</i> , C 13-2376 EMC (N.D. Cal.) | \$151.00 |
| <i>Weinstein v. The Timberland Co., et al.</i> , 06-cv-454 (N.D. Ill.) | \$150.00 |
| <i>Satterfield v. Simon & Schuster, Inc.</i> , 06-cv-2893 (N.D. Cal.) | \$175.00 |
| <i>Rojas v. Career Education Corporation</i> , 10-cv-5260 (N.D. Ill.) | \$200.00 |
| <i>Lozano v. Twentieth Century Fox Film Corp.</i> , 09-cv-6344 (N.D. Ill.) | \$200.00 |

The instant Settlement is more than reasonable in light of these other settlements under the TCPA that have been approved as fair, reasonable and adequate. *See also In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) (discussing range of acceptable TCPA class settlements based on per claimant recovery, approving \$34.60 per claiming member); *Rose v. Bank of Am. Corp.*, 5:11-CV-02390, 2014 WL 4273358, at *10 (N.D. Cal. Aug. 29, 2014) (discussing range of acceptable TCPA settlements and approving \$20.00 to \$40.00 per claimant).

It is important to recall that litigating a nationwide class action requires “unique legal skills and abilities.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008). Although the skill required to successfully prosecute a class action is evident, the “single clearest factor reflecting the quality of class counsels’ services to the class are the results obtained”. *In re Heritage Bond Litig.*, Case No. 02-ML-1475-DL, 2005 WL 1594389, at *12 (C.D. Cal. June 10, 2005). Additionally, the quality and expertise of opposing counsel is important to consider. *See Cohorst v. BRE Props., Inc.*, Case No. 3:10-CV-2666-JM-BGS, 2011 WL 7061923, at *20 (S.D. Cal. Nov. 14, 2011).

1 As discussed above, Class Counsel has negotiated a settlement in this case
 2 after a full-day mediation session that confers substantial relief to the Class. This
 3 result was accomplished despite formidable opposition by Defendant's attorneys at
 4 Troutman Sanders LLP.

5 Hence, the Settlement represents a substantial recovery for the Class and it
 6 was made possible through the skill employed by Class Counsel. As such, attorneys'
 7 fees of 22.22% of the \$450,000 Settlement Fund, or \$100,000, is manifestly
 8 reasonable and this factor supports granting the request for attorneys' fees.

9 **2. Class Counsel Faced Meaningful Risk in Taking the** 10 **Case.**

11 Though Plaintiff's claims are strong, this case involves complicated legal and
 12 factual issues and further litigation brings risk that the ultimate result to the Class
 13 could be less beneficial to the Class.

14 Class Counsel has prosecuted this matter on a contingency basis. (Woodrow
 15 Decl. ¶ 27.) At the risk of receiving nothing in return, Class Counsel initiated and
 16 diligently prosecuted this case, investing substantial time and resources. (*Id.*)
 17 Ultimately, after balancing the strength of the claims with the hurdles ahead,
 18 Plaintiff and Class Counsel concluded that the relief available through the
 19 Settlement was the best course of action for the Class. (*Id.* ¶ 28.)

20 This is particularly true given the strength of the relief made available. Under
 21 the TCPA, Class Members would be entitled to \$500 per violation, or \$1,500 if
 22 willfulness were to be proven. *See* 47 U.S.C. 227(c)(5). Under the Settlement, each
 23 Class Member may choose \$750 in cash or \$1,100 worth of storage. (Settlement
 24 Agreement, Art. 2, ¶ 2.1.) Thus, proceeding to trial would only garner a marginal
 25 benefit, if any.

26 Accordingly, the significant risk that the Class may have recovered
 27 substantially less (or perhaps nothing at all) were the case to proceed supports the
 28 reasonableness of Class Counsel's requested fee award.

3. The Benefits Extend Beyond the Settlement Fund.

Additionally, PSS has agreed that it will take commercially reasonable efforts to honor all STOP requests received by Persons to whom PSS sends text messages. (*Id.* ¶ 2.2.) This type of relief is commonly considered when weighing the benefit to the Class. *See Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973) (common fund doctrine “must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others.”). As such, this factor supports the requested fees.

4. An Award of 22.22% Falls Within the Market Rate.

The requested attorneys’ fees also fall within the market rate. As indicated above, the Ninth Circuit has determined that 25% of the Settlement Fund is an appropriate benchmark for award of attorneys’ fees. *Aboudi*, 2015 WL 266137 at *7; *see also In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 378-79 (9th Cir. 1995) (affirming 33 1/3% fee); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002) (affirming 28% fee); *Morris v. Lifescan, Inc.*, 54 Fed. Appx. 663 (9th Cir. 2003) (affirming 33% fee); *In re Nuvelo, Inc. Sec. Litig.*, No. C 07-04056 CRB, 2011 WL 2650592, at *2 (N.D. Cal. July 6, 2011) (noting that the typical fee in this Circuit is 30-33% of the fund); *In re Activision Sec. Litig.*, 723 F. Supp. at 1377-78 (“nearly all common fund awards range around 30%”). This holds true in TCPA class action settlements. *See Satterfield v. Simon & Schuster, Inc.*, (06-cv-02893-CW) (Dkt. No. 132) (N.D. Cal. Aug. 8, 2010); *see also Martin et al v. Merrill Lynch, Pierce, Fenner & Smith, Inc. et al*, (10-CV-04020-CW) (Dkt. No. 95) (N.D. Cal. Nov. 22, 2011) (granting requested attorneys’ fees of 22.9% of overall settlement fund).

Indeed, attorneys in TCPA class action settlements are routinely awarded even higher percentages. TCPA class action settlements are approved routinely where the attorneys’ fees are one-third (33%), which is substantially higher than the

1 22.22% sought here. *See Landsman & Funk, P.C. v. Skinder-Strauss Associates*, No.
 2 15-2485, 2016 WL 611441, at *3 (3d Cir. Feb. 16, 2016) (unpublished decision)
 3 (affirming award of one-third of reversionary settlement fund in TCPA class action
 4 settlement where requested fees were twice the amount of class counsel's lodestar);
 5 *Bridgeview Health Care Ctr., Ltd. v. Jerryclark*, No. 09 C 5601, 2015 WL 4498741,
 6 at *2 (N.D. Ill. July 23, 2015) (awarding one-third of common fund in TCPA class
 7 action); *Hageman v. AT&T Mobility LLC*, No. CV 13-50- BLG-RWA, 2015 WL
 8 9855925, at *4 (D. Mont. Feb. 11, 2015) (approving fee award of "\$15 million, or
 9 one-third of the common fund recovery" in TCPA class action settlement against
 10 AT&T); *Saf-T-Gard Int'l, Inc. v. Seiko Corp. of Am.*, No. 09 C 0776 (N.D. Ill. Jan.
 11 14, 2011) (awarding 33% of common fund in multimillion dollar TCPA class
 12 action); *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal.
 13 2014) ("Accordingly, the Court awards attorney's fees and costs in the amount of
 14 \$1.1 million, or 33% of the \$3.3 million settlement fund ceiling amount."); *Lees v.*
 15 *Anthem Ins. Companies Inc.*, No. 4:13CV1411 SNLJ, 2015 WL 3645208, at *4
 16 (E.D. Mo. June 10, 2015) (Approving fees in TCPA settlement representing "34%
 17 of the actual fund available to Class Members."); *Kolinek v. Walgreen Co.*, 311
 18 F.R.D. 483, 501 (N.D. Ill. 2015), appeal dismissed (Jan. 27, 2016), appeal dismissed
 19 (Feb. 1, 2016), appeal dismissed (Feb. 3, 2016) (awarding 36% of common fund in
 20 TCPA class action settlement); *Spine & Sports Chiropractic, Inc. v. ZirMed, Inc.*,
 21 No. 3:13-CV- 00489, 2015 WL 9413143, at *1 (W.D. Ky. Dec. 22, 2015)
 22 (approving one third of fund as attorney's fees).

23 As such, the market rate also supports the requested fees.

24 **5. Class Counsel Faced Costs and Were Unable to Take Other** 25 **Cases While Prosecuting this Matter.**

26 This factor, which examines the burdens to Class Counsel, also supports
 27 granting the requested attorneys' fees. Here, Class Counsel advanced all costs,
 28 including filing fees, mediation costs, and travel to San Diego for the preliminary

1 (and final) approval hearing. (Woodrow Decl. ¶ 29.) Had the case proceeded, Class
 2 Counsel were prepared to retain experts to perform an analysis and review of PSS's
 3 text messaging platform to identify the root cause of the issue that lead it to send text
 4 messages to people who had responded "STOP." (*Id.*)

5 Class Counsel's work in this case also prevented the attorneys from working
 6 on other matters. (*Id.* ¶ 30.) Class Counsel's firms are not large outfits and must be
 7 careful regarding the cases they take. (*Id.*) Having said that, investing the time into
 8 researching and prosecuting a federal class action necessarily means that attention is
 9 diverted away from other cases. (*Id.*) It is not as if this case was settled with a
 10 handful of telephone calls and barely interrupted Class Counsel's routine. (*Id.*)
 11 Rather, Class Counsel spent meaningful attorneys' time investigating the claims,
 12 preparing for the and participating in the mediation, drafting all settlement
 13 documents, and presenting the Settlement to the Court for preliminary approval.
 14 (*Id.*)

15 This factor therefore supports the requested fees as well.

16 **6. Class Counsel Prosecuted this Case on a Contingent Basis.**

17 The final factor considers whether the case has been litigated on a contingent
 18 basis. Put simply, the nature of Class Counsel's representation also supports the
 19 requested fee award. Contingent fees allow competent counsel to accept cases and
 20 provide adequate representation in class actions and are a basis for providing a
 21 larger fee than if the matter was billed on a flat or hourly basis. *In re OmniVision*,
 22 559 F. Supp. 2d. at 1047 (citing *In re Wash. Pub. Power Supply Systems Securities*
 23 *Litigation*, 19 F.3d 1291, 1299-1300 (9th Cir. 1994)). "It is an established practice in
 24 the private legal market to reward attorneys for taking the risk of non-payment by
 25 paying them a premium over their normal hourly rates for winning contingency
 26 cases...as a legitimate way of assuring competent representation for plaintiffs who
 27 could not afford to pay on an hourly basis regardless whether they win or lose." *In*
 28 *re Wash.*, 19 F.3d at 1299.

1 At the time of filing this lawsuit on a contingent fee basis, Class Counsel
 2 knew they may spend hundreds of hours of attorney time in contested litigation with
 3 no guarantee of recovery. To date, they have, in fact, devoted hundreds of hours
 4 representing Plaintiff and the Class without compensation and spent time on the
 5 issues that may have been spent on cases or work matters. (Woodrow Decl. ¶ 32.)
 6 And as explained further below, Class Counsel has also advanced the costs of this
 7 suit without reimbursement.

8 Thus, given the exceptional results achieved when compared with other
 9 TCPA class action settlements, the skill and efficiency with which the case has been
 10 litigated, the awards in other cases, and the contingent nature of the representation, a
 11 22.22% fee award is plainly justified here.

12 **B. The Requested Fee is Also Reasonable Under the Lodestar Method.**

13 The requested fee award of \$100,000 is also reasonable when applying the
 14 lodestar method—either as a cross-check to the percentage-of-the-fund approach or
 15 as the primary method of calculation.

16 The “lodestar method” calculates attorneys’ fees by multiplying the number
 17 of hours that class counsel reasonably expended on the litigation by an hourly rate
 18 that takes into consideration the experience of the lawyers and their geographic
 19 location. *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003). When performing
 20 a lodestar cross-check, mathematical exactitude is not required. *In re Immune*
 21 *Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1176 (S.D. Cal. 2007) (citing *In re Rite*
 22 *Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005)); *Thieriot v. Celtic Ins.*
 23 *Co.*, No. C-10-04462-LB, 2011 WL 1522385, at *6 (N.D. Cal. Apr. 21, 2011);
 24 *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2007 WL 951821, at *6 (N.D.
 25 Cal. Mar. 28, 2007) (“In contrast to the use of the lodestar method as a primary tool
 26 for setting a fee award, the lodestar cross-check can be performed with a less
 27 exhaustive cataloging and review of counsel’s hours.”) Further, courts typically
 28 apply a multiplier to the lodestar to account for class counsel taking on the litigation

1 at a substantial risk of non-payment. *Vizcaino*, 290 F.3d at 1051.

2 In this case, and as reflected in the chart below, Class Counsel expended a
3 total of 232.6 firm hours investigating, litigating, and settling this lawsuit for a total
4 current lodestar of \$83,894.

| Attorney Name/Firm | Position | Rate | Hours | Lodestar |
|--------------------|------------|-------|-------|----------|
| Steven Woodrow | Partner | \$430 | 35.7 | \$15,351 |
| Patrick Peluso | Partner | \$330 | 86.1 | \$28,413 |
| Stefan Coleman | Partner | \$450 | 83.0 | \$37,350 |
| Law Clerks | Law Clerks | \$100 | 27.8 | \$2,780 |
| LODESTAR | | | 232.6 | \$83,894 |

11 (Woodrow Decl. ¶ 31; *see also* Coleman Decl., attached as Ex. B, ¶ 11.) On top of
12 this, Class Counsel projects expending an additional \$10,000 - \$15,000 in time
13 seeing the Settlement through to final approval, which includes calling Settlement
14 Class Members on the class list and assisting them with the filing of their claims.
15 (Woodrow Decl. ¶ 33.)

16 Plaintiff's counsel's hourly rates are well below the market rate for
17 comparable attorneys in this District. *See Fontes v. Heritage Operating, L.P.*, No.
18 14CV1413-MMA (NLS), 2016 WL 1465158, at *6 (S.D. Cal. Apr. 14, 2016)
19 (approval counsel's hourly rates ranging from \$495-\$695 per hour). Rather, each
20 attorney's hourly rate is the same as those charged by hourly-paying clients.
21 (Woodrow Decl. ¶ 34.) Moreover, Class Counsel has diligently attempted to avoid
22 duplication of effort and to delegate work efficiently. (*Id.* ¶ 35.)

23 While a lodestar amount is presumptively reasonable, it may be adjusted
24 upward by a multiplier typically ranging between 1 and 4 to account for the risk
25 faced in taking the case. *See Alba Conte & Herbert B. Newberg, Newberg on Class*
26 *Actions*, 14:03 (3d Ed. 1992) (recognizing that multipliers of one to four are
27 frequently awarded). In fact, the Ninth Circuit has found an abuse of discretion not
28 to apply a multiplier in certain matters. *Fischel v. Equitable Life Assur. Soc'y of*

1 U.S., 307 F.3d 997, 1008 (9th Cir. 2002) (“It is an abuse of discretion to fail to apply
 2 a risk multiplier, however, when (1) attorneys take a case with the expectation that
 3 they will receive a risk enhancement if they prevail, (2) their hourly rate does not
 4 reflect that risk, and (3) there is evidence that the case was risky”).

5 Here, Class Counsel’s requested fee award of \$100,000 requires a multiplier
 6 of only 1.03 of Counsel’s lodestar to justify. This is calculated by taking the fee
 7 request and subtracting the out of pocket expenses. Here that is \$100,000 -
 8 \$3,108.59 = 96,891.41. The current lodestar (\$83,894) plus the additional \$10,000 in
 9 anticipated future lodestar are then divided (96,891.41/93,894) which equals 1.03.
 10 As such, only a multiplier of 1.03 to Class Counsel’s lodestar is required to justify
 11 the requested attorneys’ fees, which squarely falls in between the 1 to 4 range for
 12 typical lodestar multipliers.³

13 A multiplier is warranted here. Class Counsel expended time and effort
 14 researching the law, drafting and editing briefs, motions, mediation documents, and
 15 attending a full-day mediation session—all without guarantee of payment.
 16 (Woodrow Decl. ¶ 30.) Indeed, the risks present in a nationwide class action are
 17 manifest—issues abound that can doom a case, including legal issues affecting the
 18 class, problems with the named plaintiff, discovery pitfalls, and other risks. Yet the
 19 effort and skill employed by Class Counsel paid off: the Settlement Agreement
 20 makes substantial relief available to Settlement Class Members.

21 Considering the rates Class Counsel typically bills in their normal practice fall
 22 below those charged in the relevant market and do not account for the risks posed by
 23 the case, Class Counsel would have been hard pressed to have agreed to prosecute
 24 this matter absent the prospect of a multiplier. (*Id.* ¶ 36.) As such, a multiplier is

25
 26
 27 ³ Taking only the current lodestar would result in a multiple of 1.15, which is plainly
 28 still at the lower end of the range. (96,685.41/83,894 = 1.15)

1 warranted, and here it is currently only 1.15 (and may indeed go negative by the
2 time the Settlement Agreement is seen through to its final conclusion).

3 Application of the lodestar analysis thus confirms that the requested fee is
4 reasonable and should be approved. Class Counsel's firms expended 232.6 hours for
5 a lodestar of \$83,894, which only results in a 1.15 multiplier (which will go lower).
6 The fees are thus reasonable under both methods of review.

7 **C. Class Counsel Also Incurred \$3,109.59 in Expenses.**

8 As indicated, Class Counsel incurred costs of \$3,109.59 fighting and settling
9 the case. (*Id.* ¶ 37.) These costs were all tailored to the case. None are excessive;
10 rather, each was needed to advance the litigation or Settlement through the
11 mediation. (*Id.*) The expenses should be approved as a result.

12 **D. The Court Should Approve the Requested Incentive Award.**

13 Finally, to compensate class representatives for the work they do on behalf of
14 absent class members, courts typically grant requests for incentive awards.
15 *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). Incentive
16 awards are commonplace in class actions and are intended to "compensate class
17 representatives for work done on behalf of the class, to make up for financial or
18 reputational risk undertaken in bringing the action, and, sometimes, to recognize
19 their willingness to action as a private attorney general." *Hartless v. Clorox Co.*, 273
20 F.R.D. 630, 646 (S.D. Cal. 2011).

21 Here, Plaintiff seeks an incentive award of \$3,000, which is reasonable
22 considering his involvement was essential to the ultimate success of the settlement
23 and his continued willingness to assume the responsibilities expected of class
24 representatives, including protecting the interests of the Class instead of simply
25 furthering his own interests. (Woodrow Decl. ¶ 38.) Such an award is comparable to
26 awards issued in this Circuit. *See Bellinghausen v. Tractor Supply Co.*, No. 13-cv-
27 02377, 2015 WL 1289342, at *16 (N.D. Cal. Mar. 20, 2015) (finding that incentive
28 awards "typically range from \$2,000 to \$10,000."); *Hopson v. Hanesbrands Inc.*,

No. CV-08-0844, 2009 WL 928133, at *10 (N.D. Cal. Apr. 3, 2009) (approving incentive award of \$5,000 in \$408,420 settlement).

Accordingly, the agreed-upon collective incentive award of \$3,000 is reasonable and should also be approved by the Court.

IV. CONCLUSION

For the foregoing reasons, Plaintiff Mendez respectfully requests the Court enter an Order awarding attorneys' fees in the amount of \$100,000 and an incentive award in the amount of \$3,000, and provide such other and further relief as the Court deems reasonable and just.

Dated: July 1, 2016

Respectfully Submitted,

Eric Mendez, individually and on behalf
of the Settlement Class

/s/ Steven L. Woodrow
One of Plaintiff's Attorneys

Richard T. Drury
richard@lozeaudrury.com
Rebecca Davis
rebecca@lozeaudrury.com
LOZEAU DRURY LLP
410 12th Street, Suite 250
Oakland, CA 94607
Telephone: (510) 836-4200
Facsimile: (510) 836-4205

Steven L. Woodrow*
(swoodrow@woodrowpeluso.com)
Patrick H. Peluso*
(ppeluso@woodrowpeluso.com)
Woodrow & Peluso, LLC
3900 East Mexico Ave., Suite 300
Denver, Colorado 80210
Telephone: (720) 213-0675
Facsimile: (303) 927-0809

Stefan Coleman, Esq.
LAW OFFICES OF STEFAN COLEMAN, LLC
201 S Biscayne Blvd, 28th Floor
Miami, Florida 33131
Telephone: (877) 333-9427

1 law@stefancoleman.com

2 **pro hac vice*

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CERTIFICATE OF SERVICE

The undersigned certifies that, on July 1, 2016, I caused this document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

/s/ Steven L. Woodrow